

The Administrative Law Judge found claimant entitled to permanent disability benefits for a twenty-five percent (25%) impairment of function to the right leg and assessed the entirety of the Award to the respondent and insurance carrier. The respondent and insurance carrier request the Appeals Board to review the liability of the Workers Compensation Fund. The claimant requests the Appeals Board to review the finding of the nature and extent of disability. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

(1) The Appeals Board adopts the finding of the Administrative Law Judge that claimant has experienced a twenty-five percent (25%) impairment of function to the right leg. The rating is within a reasonable range of impairment as established by the medical evidence. Both Ernest R. Schlachter, M.D., and Kenneth Zimmerman, M.D., testified that claimant has sustained a functional impairment of twenty-five percent (25%) to the leg as a result of the work-related accident of June 17, 1992, whereas Daniel D. Zimmerman, M.D., testified the impairment was forty percent (40%). The opinions of Dr. Schlachter and Dr. Kenneth Zimmerman are persuasive.

(2) The Appeals Board adopts the finding of the Administrative Law Judge that the Workers Compensation Fund has no liability for this injury. Respondent contends an earlier injury to the left leg caused or contributed to the injury of the right knee. The Appeals Board disagrees.

Because it lacked knowledge of right knee problems before the accident in June 1992, the respondent may not rely upon preexisting impairment to the right lower extremity to establish Fund liability and is now limited to attempt to establish its claim based upon preexisting impairment to the left lower extremity. However, the Appeals Board finds the evidence fails to establish the right knee injury or disability would not have occurred but for preexisting physical impairment to the left leg. To the contrary, because of the mechanism of injury the Appeals Board finds the accident and disability more likely than not would have occurred irrespective of preexisting physical impairment to the left leg. Likewise, the Appeals Board finds the evidence fails to establish a preexisting impairment to the left leg contributed to the resulting disability. The requirements of K.S.A. 1991 Supp. 44-567 have not been met to shift any liability to the Workers Compensation Fund.

Although Ernest R. Schlachter, M.D., testified the right knee injury would not have occurred but for the preexisting impairment in the left knee, his opinion is unpersuasive because it was based upon assumptions of fact not established by the evidence. Dr. Schlachter assumed that immediately prior to the accident in June 1992, claimant was limping and occasionally used a cane to walk. Likewise, Dr. Kenneth Zimmerman's opinion regarding the relationship of the left lower extremity to the right knee injury is unpersuasive because he also assumes claimant was favoring the left leg before the accident which is not established by the evidence.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated December 14, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
Kendall R. Cunningham, Wichita, Kansas
John D. Clark, Administrative Law Judge
George Gomez, Director